10 *Summons*

peal were presented to Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York, on September 26, 1936, and the order allowing the appeal and the citation were signed on that day and the bond approved. All of the foregoing papers were filed on September 28, 1936, except the citation, which was served on the attorney for defendant on September 30, 1936 and filed October 2, 1936.

11

Summons

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

L56—Page 369

GEORGE S. VAN SCHAICK, Superintendent of Insurance of the State of New York, as Liquidator of the SOUTHERN SURETY COMPANY OF NEW YORK,

12

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

To the Above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the

service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 20th day of January A. D. 1934.

CHARLES WEISER,
Clerk.

LOUIS H. PINK,
Plaintiff's Attorney,
Office and Post Office Address,
80 Centre Street,
Borough of Manhattan,
City of New York.

Complaint

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Plaintiff, by Louis H. Pink, his attorney, for his complaint herein, respectfully alleges:

First: That plaintiff is the Superintendent of Insurance of the State of New York and is a citizen of that State.

16 *Complaint*

Second: Upon information and belief, that heretofore and prior to April 1, 1930, the Southern Surety Company of New York was duly organized under and by virtue of the laws of the State of New York, and authorized, among other things, to do a surety and insurance business.

Third: That on the 22nd day of March, 1932 an order of the Supreme Court of the State of New York was duly made and entered in the office of the Clerk of the County of New York, wherein it was
17 ordered, adjudged and decreed that the Southern Surety Company of New York was insolvent.

Fourth: That in and by said order and pursuant to the provisions of the Insurance Law of the State of New York, plaintiff was directed to take possession of the property of the Southern Surety Company of New York and liquidate its business, and was vested with title to all the property, contracts, and rights of action belonging to the Southern Surety Company of New York.

Fifth: That plaintiff, as Superintendent of In-
18 surance of the State of New York, took possession of the property of the Southern Surety Company of New York and proceeded to liquidate the business thereof.

Sixth: Upon information and belief, that defendant is a corporation duly organized and existing under the laws of the State of Maryland.

Seventh: Upon information and belief, that heretofore and on or about December 12, 1930, the Southern Surety Company of New York duly exe-

cuted and delivered to John DeMartini Co., Inc. a policy of fidelity insurance wherein said Southern Surety Company of New York bound itself in an amount not exceeding the sum of Ten Thousand Dollars ($10,000) to said John DeMartini Co., Inc., to reimburse said John DeMartini Co., Inc. for any pecuniary loss sustained by it through any fraudulent or dishonest acts committed by any employee of said John DeMartini Co., Inc. during the term of said policy.

Eighth: Upon information and belief, that heretofore and while said policy of fidelity insurance was in full force and effect, one Marvin Goldblatt was employed by the said John DeMartini Co., Inc., and that said Marvin Goldblatt was one of the employees of John DeMartini Co., Inc. for whose fraudulent or dishonest acts the Southern Surety Company of New York bound itself, under its policy of fidelity insurance, to reimburse said John DeMartini Co., Inc.

Ninth: Upon information and belief, that heretofore and while said policy of fidelity insurance was in full force and effect, and at various times and dates between April 14, 1931, and October 22, 1931, said Marvin Goldblatt committed various fraudulent and dishonest acts, as the result of which said John DeMartini Co., Inc. sustained losses amounting to the sum of Seven Thousand Forty-Five and 41/100 Dollars ($7,045.41).

Tenth: Upon information and belief, that said John DeMartini Co., Inc. duly filed with the Southern Surety Company of New York proofs of loss concerning said fraudulent and dishonest acts

committed by said Marvin Goldblatt, and duly performed all the conditions of the policy of fidelity insurance delivered and executed by the said Southern Surety Company of New York to John DeMartini Co., Inc.

Eleventh: Upon information and belief, that by reason of the facts hereinabove set forth, the said Southern Surety Company of New York became and is liable to said John DeMartini Co., Inc., under said policy of fidelity insurance, in the
23 amount of Seven Thousand Forty-Five and 41/100 Dollars ($7,045.41); and that the said liability of the Southern Surety Company of New York has been determined and allowed in the liquidation proceedings thereof in said amount of Seven Thousand Forty-Five and 41/100 Dollars ($7,045.41).

Twelfth: Upon information and belief, that heretofore and on or about December 12, 1930, defendant, for a valuable consideration, agreed to reinsure the Southern Surety Company of New York and to indemnify it against liability incurred
24 by said Southern Surety Company of New York on the policy of fidelity insurance hereinabove set forth, issued by said Southern Surety Company of New York to John DeMartini Co., Inc., in the amount of one-half (½) of such liability, and not exceeding the sum of Five Thousand Dollars ($5,000).

Thirteenth: Upon information and belief, that said reinsurance by the defendant of the Southern Surety Company of New York on the policy of fidelity insurance issued to John DeMartini Co., Inc. was subject to the terms of a general reinsur-

25

ance contract entered into between the defendant and the Southern Surety Company of New York on or about the 1st day of April, 1930; that a copy of such general reinsurance contract is attached hereto, made a part hereof, and marked Exhibit A.

Fourteenth: Upon information and belief, that said reinsurance contract was in full force and effect at all times hereinabove mentioned, and that the Southern Surety Company of New York has duly performed all the conditions of such contract on its part.

26

Fifteenth: Upon information and belief, that by reason of the facts hereinabove set forth, the defendant became and is liable to the Southern Surety Company of New York, under said reinsurance contract, in the amount of Three Thousand Five Hundred Twenty-Two and 71/100 Dollars ($3,522.71).

Sixteenth: That the plaintiff, as Liquidator of the said Southern Surety Company of New York, has duly made demand of the defendant for payment of the said sum of Three Thousand Five Hundred Twenty-Two and 71/100 Dollars ($3,522.71), but no part thereof has been paid to said Southern Surety Company of New York or to the plaintiff as Liquidator thereof.

27

WHEREFORE, the plaintiff demands judgment of the defendant in the sum of Three Thousand Five Hundred Twenty-Two and 71/100 Dollars

28 *Complaint*

($3,522.71), with interest from November 17, 1933, and costs.

LOUIS H. PINK,
Attorney for Plaintiff,
Office & P. O. Address:
80 Centre Street,
New York, N. Y.

(Verification not printed)

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Exhibit A to the complaint, consisting of the "General Reinsurance Agreement" between Fidelity and Deposit Company of Maryland and Southern Surety Company of New York, to which is attached the Standard Form of Reinsurance Agreement adopted by the Surety Association of America on January 15, 1930, is printed *infra*, page 41, as Exhibit C to the Stipulation of Facts.

Answer

30

(Note: The original answer and first amended answer are not printed, another amended answer having been subsequently served and filed.)

Stipulation for Amendment of Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

Plaintiff,

against

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, through their respective counsel, that the defendant may file the amended answer attached hereto, and service of a copy thereof is hereby accepted.

Dated, April 24, 1936.

EUGENE M. CLENNON,
Attorney for Plaintiff.
By IRVIN WALDMAN,
Counsel.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant.

So Ordered: 4/27/36
JNO. C. KNOX,
U. S. D. J.

34

Amended Answer

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Defendant, by Hughes, Schurman & Dwight, its attorneys, answering the complaint herein,

35 I. Denies on information and belief each and every allegation in paragraph "Twelfth" of said complaint except that defendant admits that heretofore and on or about December 12, 1930, defendant, for a valuable consideration, signed a memorandum, a copy of which is attached hereto, made a part hereof, and marked Exhibit A, which had theretofore been signed by Southern Surety Company of New York, and that the bond referred to in said memorandum was the policy referred to in said paragraph.

II. Denies on information and belief each and 36 every allegation contained in paragraph "Fourteenth" of said complaint except that defendant admits that the reinsurance contract herein admitted was in full force and effect at the times mentioned in said paragraph.

III. Denies on information and belief each and every allegation contained in paragraph "Fifteenth" of said complaint.

IV. Denies on information and belief each and every allegation contained in paragraph "Six-

teenth" of said complaint except that defendant admits that plaintiff, as Liquidator of Southern Surety Company of New York, demanded payment from defendant of $3,522.71, and that no part of said sum has been paid to said Southern Surety Company of New York or to the plaintiff as Liquidator thereof.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

V. No part of the liability referred to in paragraph "Eleventh" of said complaint has been paid, there has never been delivered to defendant proof of the payment of any part of the losses referred to in paragraph "Ninth" of said complaint, and there has never been given to defendant any written notice of any intention on the part of said Southern Surety Company of New York or the Liquidator thereof to pay all or any part of said losses. 38

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

VI. No part of the liability referred to in paragraph "Eleventh" of said complaint has been paid, and neither said Southern Surety Company of New York nor the Liquidator thereof has suffered any loss by reason of the facts set forth in the complaint. 39

FOR A PARTIAL DEFENCE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF.

VII. Defendant repeats and realleges each and every allegation in paragraph VI hereof with the same force and effect as if the same were herein set forth in full.

Amended Answer

VIII. The total liabilities of said Southern Surety Company of New York are, and since March 22, 1932, have been, substantially in excess of its total assets, and said company is insolvent and plaintiff as Liquidator thereof will not be able to pay the creditors thereof, including John DeMartini Co., Inc., with respect to its claim in the amount of $7,045.41 described in paragraphs "Seventh" and "Eleventh" of the complaint, in full even if he receives the full amount claimed herein and all other amounts to which he may claim to be entitled under other reinsurance agreements.

IX. Upon complete liquidation of said company and distribution of its assets John DeMartini Co., Inc. will receive no more than a liquidating dividend or dividends on its said claim in the same proportion and to the same extent as other general creditors of said company and any loss which said company or the Liquidator thereof may suffer by reason of the facts set forth in the complaint cannot exceed the amount of said liquidating dividend or dividends.

WHEREFORE defendant demands judgment dismissing the complaint together with the costs and disbursements of this action.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant,
Office and P. O. Address,
100 Broadway,
Borough of Manhattan,
New York, N. Y.

(Verification not printed)

Exhibit A to the amended answer is printed *infra*, page 48, as Exhibit D to the Stipulation of Facts.

Stipulation Waiving Jury Trial

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK, 44

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED between the parties to this cause that a jury trial shall be waived and that the case shall be tried before a Judge of this Court without the aid or intervention of a jury.

Dated, March 30, 1936.

45

EUGENE M. CLENNON,
Attorney for Plaintiff,
By IRVIN WALDMAN,
Counsel.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant.

46

Stipulation of Facts

(Note: The stipulation of facts is printed *infra*, page 18.)

Bill of Exceptions

[SAME TITLE]

47

BE IT REMEMBERED that, on June 22, 1936, the above entitled cause came on for trial upon the issues joined herein before the Honorable Alfred C. Coxe, sitting as a Judge of this Court, without a jury, a jury having been duly waived by the parties by a written stipulation which is as follows:

Stipulation Waiving Jury Trial

(Note: The stipulation waiving a jury trial is printed at page 15, *supra*.)

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The plaintiff, to sustain the issues on its part, filed the agreed statement of facts hereinafter set forth and, by stipulation of the parties, said agreed statement of facts and the exhibits attached thereto were filed and introduced into evidence in this cause with the same force and effect as if read into evidence.

Said agreed statement of facts was all of the evidence offered or introduced at the trial of this cause.

In the progress of the trial the Court made rulings, to each of which the defendant duly ex-

cepted at the time thereof, overruling and denying the following motions made by the defendant:

(1) Motion made at the close of the plaintiff's case, and renewed at the close of the whole case, to dismiss the complaint and to non-suit the plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for the plaintiff;

(2) Motion made at the close of the whole case to dismiss the complaint and to non-suit the plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for the plaintiff;

(3) Motion made at the close of the whole case for judgment for the defendant on all the grounds open to the defendant on the issues and pleadings.

With the consent of the parties, the Court made said agreed statement of facts its special findings of fact.

Said agreed statement of facts and said special findings are as follows:

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Stipulation of Facts

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, through their respective counsel, for the purpose of this
53 suit only, that the following facts shall be taken as true, subject and without prejudice to the right of either party to question the materiality or relevancy of any of such facts or any document herein referred to and to make any contention with respect to the legal effect thereof, further or better proof of which, however, shall not be required for the purpose of establishing the same.

1. Plaintiff is the Superintendent of Insurance of the State of New York and is a citizen of that State, and was substituted herein as plaintiff in place of George S. Van Schaick, his predecessor as
54 Superintendent of Insurance, who had commenced this action as Liquidator of Southern Surety Company of New York.

2. At all times herein mentioned up to March 22, 1932, Southern Surety Company of New York was duly organized under and by virtue of the laws of the State of New York, and authorized, among other things, to do a surety and insurance business.

3. On March 22, 1932, an order of the Supreme Court of the State of New York was duly made

and entered in the office of the Clerk of the County of New York, wherein it was ordered, adjudged and decreed that Southern Surety Company of New York was insolvent. A copy of said order is annexed hereto as Exhibit A and is hereby made a part hereof.

4. In and by said order and pursuant to the provisions of the Insurance Law of the State of New York, plaintiff's predecessor as Superintendent of Insurance was directed to take possession of the property of Southern Surety Company of New York and liquidate its business, and was vested with title to all the property, contracts and rights of action belonging to Southern Surety Company of New York.

5. Plaintiff's predecessor, as Superintendent of Insurance of the State of New York, took possession of the property of Southern Surety Company of New York and proceeded to liquidate the business thereof. On becoming Superintendent of Insurance plaintiff succeeded to all right, title and interest of his predecessor and took possession of said property, as Liquidator of Southern Surety Company of New York.

6 Defendant at all times herein mentioned was and is a corporation duly organized and existing under the laws of the State of Maryland and was authorized, among other things, to enter into and perform such agreements as are here involved.

7. On or about December 12, 1930, Southern Surety Company of New York duly executed and delivered to John DeMartini Co., Inc., a bond or

58 *Stipulation of Facts*

policy of fidelity insurance, a copy of which is annexed hereto as Exhibit B and is hereby made a part hereof, wherein Southern Surety Company of New York bound itself in an amount not exceeding the sum of Ten Thousand Dollars ($10,000) to John DeMartini Co., Inc., to reimburse John DeMartini Co., Inc., for any pecuniary loss sustained by it through any fraudulent or dishonest acts committed by any employee of John DeMartini Co., Inc., during the term of said bond or
59 policy.

8. While said bond or policy of fidelity insurance was in full force and effect, one Marvin Goldblatt was employed by John DeMartini Co., Inc., and said Marvin Goldblatt was one of the employees of John DeMartini Co., Inc. for whose fraudulent or dishonest acts Southern Surety Company of New York bound itself, under its policy of fidelity insurance, to reimburse John DeMartini Co., Inc.

9. While said bond or policy of fidelity insur-
60 ance was in full force and effect, and at various times and dates between April 14, 1931, and October 22, 1931, said Marvin Goldblatt committed various fraudulent and dishonest acts, as the result of which John DeMartini Co., Inc. sustained a loss amounting to the sum of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41).

10. John DeMartini Co., Inc. duly filed with Southern Surety Company of New York proofs of loss concerning said fraudulent and dishonest acts committed by said Marvin Goldblatt and duly performed all the conditions of the said bond or policy

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of fidelity insurance delivered and executed by Southern Surety Company of New York to John DeMartini Co., Inc., on its part to be performed.

11. By reason of the facts hereinabove set forth, Southern Surety Company of New York became and is liable to John DeMartini Co., Inc., under said bond or policy of fidelity insurance in the amount of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41); and said liability of Southern Surety Company of New York has been determined and allowed in the liquidation proceeding thereof in said amount of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41).

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12. At the time of the entry of the order of liquidation of Southern Surety Company of New York referred to in paragraph 3 hereof, the claim of John DeMartini Co., Inc. against Southern Surety Company of New York referred to in paragraph 11 hereof was in the process of examination and investigation by said company.

13. On or about April 1, 1930, Southern Surety Company of New York and defendant made an agreement, hereinafter referred to as the "general reinsurance agreement", a copy of which is annexed hereto as Exhibit C and is hereby made a part hereof. Thereafter and on or about December 12, 1930, Southern Surety Company of New York and defendant signed a memorandum, a copy of which is annexed hereto as Exhibit D and is hereby made a part hereof. The general reinsurance agreement referred to in said memorandum is the agreement referred to above as Exhibit C and the bond referred to in said memorandum is the bond

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64 *Stipulation of Facts*

or policy referred to in paragraph 7 hereof. Said memorandum and said general reinsurance agreement were in full force and effect at all times hereinabove mentioned.

14. Neither Southern Surety Company of New York nor the Liquidator thereof nor anyone else has paid any part of the liability of said company referred to in paragraph 11 hereof, or delivered to defendant proof of payment of any part of the loss referred to in paragraph 9 hereof, or given written
65 notice of intention to pay the loss in accordance with lines 74-76 of the standard form or reinsurance agreement included in and made a part of Exhibit C.

15. Prior to the commencement of this action, plaintiff demanded and now seeks payment from defendant in the sum of Three Thousand Five Hundred Twenty-two and 71/100 Dollars ($3,522.71) with interest from November 17, 1933, the date of the allowance of the claim of John DeMartini Co., Inc. by the Liquidator.

16. No part of the amount demanded by plain-
66 tiff has been paid by defendant.

17. Southern Surety Company of New York is now being administered by the Liquidator thereof and it appears from the books, records and documents and all property in his possession as Liquidator of Southern Surety Company of New York that the total liabilities thereof are, and since the institution of the liquidation proceedings have been, substantially in excess of the total assets, that the company is insolvent and that he will not be able to pay the creditors of Southern Surety

Company of New York, including John DeMartini Co., Inc., with respect to its claim in the amount of $7,045.41 referred to in paragraph 11 hereof, in full even if the Liquidator receives the full amount claimed herein and any other amounts to which he may claim to be entitled under other reinsurance agreements. 67

18. Upon complete liquidation of Southern Surety Company of New York and distribution of its assets, John DeMartini Co., Inc., will receive a liquidating dividend or dividends on its claim of $7,045.41 referred to in paragraph 11 hereof, in the same proportion and to the same extent as other general creditors of Southern Surety Company of New York. 68

19. Upon receipt at its home office of notice of the claim and loss of John DeMartini Co., Inc., herein referred to, Southern Surety Company of New York gave defendant at its home office prompt written notice thereof.

20. Southern Surety Company of New York and the Liquidator thereof duly performed all the terms, covenants and conditions of said reinsurance agreement on the part of said company to be performed, except as herein stated. 69

21. The documents served upon Southern Surety Company of New York by John DeMartini Co., Inc., relating to claims and losses under the policy, contract of insurance, or bond issued by Southern Surety Company of New York to John DeMartini Co., Inc., were and are proper and sufficient.

70 *Stipulation of Facts*

22. The proof of claim filed by John DeMartini Co., Inc., in the sum of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41), with the Superintendent of Insurance of the State of New York, as Liquidator of Southern Surety Company of New York, was proper and sufficient and the allowance, adjustment and admission thereof as a claim against the assets of the company in the sum of Seven Thousand Forty-five and 41/100 Dollars ($7,045.41), was proper and valid.

71 23. The standard form of agreement referred to in paragraph 3 of the general reinsurance agreement (Exhibit C hereto) was adopted by the Surety Association of America on January 15, 1930, in place of a prior standard form which had been adopted by said association on May 12, 1915, a copy of which is annexed hereto as Exhibit E and is hereby made a part hereof.

Dated, March 30, 1936.

EUGENE M. CLENNON,
Attorney for Plaintiff,
72 By IRVIN WALDMAN,
Counsel.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant.

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Exhibit A

ORDER OF LIQUIDATION

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, in the Borough of Manhattan, City, County and State of New York, in the First Judicial District, on the 22nd day of March, 1932.

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Present:

HONORABLE JOHN FORD,
Justice

In the Matter of

the Application of the

PEOPLE OF THE STATE OF NEW YORK, by GEORGE S. VAN SCHAICK, Superintendent of Insurance of the State of New York, for an order to take possession of the property and liquidate the business

of the

75

SOUTHERN SURETY COMPANY OF NEW YORK.

Upon reading and filing the petition of George S. Van Schaick, Superintendent of Insurance of the State of New York, duly verified the 15th day of March, 1932, and the exhibit thereto annexed, made a part thereof and marked Exhibit A, and the

order to show cause thereon granted by Mr. Justice E. J. Glennon, one of the Justices of the Supreme Court of the State of New York, in the First Judicial District of the said State, on the 15th day of March, 1932, and upon proof of due service of the said order to show cause and the papers upon which it was granted upon the Southern Surety Company of New York, by affidavit of Joseph T. Moore, sworn to the 15th day of March, 1932, and upon reading and filing the affidavit of
77 George S. Van Schaick, Superintendent of Insurance of the State of New York, sworn to the 22nd day of March, 1932, and it appearing to my satisfaction that the Southern Surety Company of New York is a corporation organized under and by virtue of the laws of the State of New York, and particularly under Article II of the Insurance Law thereof; that the Southern Surety Company of New York was incorporated on or about the 27th day of June, 1928; that the said corporation has been transacting the business of insurance in the State of New York; that its principal office is located at 111 John Street, in the Borough of Manhattan, City, County and State of New York,
78 which is in the First Judicial District of the Supreme Court of the said State; that the aforesaid Southern Surety Company of New York is amenable to the Insurance Law of the State of New York and subject to the examination and supervision of the Superintendent of Insurance of the State of New York and the Insurance Department, and has been examined by an official examiner of the Insurance Department duly appointed for that purpose pursuant to law by the petitioner as Superintendent of Insurance, and said examiner, after such examination was duly

made, submitted to the petitioner and to the Insurance Department, pursuant to law, a sworn report of such examination of the Southern Surety Company of New York, and that the report of such examiner has been duly filed in the office of the State Department of Insurance and of the Superintendent of Insurance of the State of New York, and it appearing from the said report annexed to the petition and marked Exhibit A that the company is in possession of admitted assets in the sum of $5,396,918.50; that its liabilities, exclusive of capital stock, amount to $5,951,571.72, which is 80
$554,653.22 in excess of its admitted assets, without any provision for its capital stock liability of $750,000.00, making a total deficiency of admitted assets of $1,304,653.22; that the Southern Surety Company of New York is insolvent, and that it has been found upon examination to be in such condition that its further transaction of business will be hazardous to its policyholders, to its creditors and to the public, and that its continuance in the business of insurance would be contrary to public policy; that it should be dissolved and liquidated under and pursuant to the laws of the State of 81
New York, and particularly under the Insurance Law thereof; and it further appearing that the reason why the return of the order to show cause is desired upon less than the usual eight days' notice for service of such orders for notice of motion is because the statute requires the above-entitled proceeding to be instituted by an order to show cause and further because delay will be prejudicial to the policyholders, creditors, stockholders and the public, and because the said corporation is in a hazardous and precarious condi-

82 *Exhibit A*

tion; that no previous application for the order herein asked for or for any like order or similar relief has been made to any court or judge, and the motion on such order to show cause having duly and regularly come on before the court for hearing, and after hearing Honorable John J. Bennett, Jr., Attorney-General of the State of New York, Joseph G. Bill, Esquire, a Special Deputy Assistant Attorney-General, of counsel, representing the Superintendent of Insurance of the State of New York, in support of said motion, Daniel F.
83 Cohalan (Rolland R. Rasquin of Counsel, appearing for certain stockholders, but not opposing; and after a full hearing, and due deliberation having been had thereon, and upon filing the opinion of the court, it is hereby

ORDERED, ADJUDGED AND DECREED, that the petition of George S. Van Schaick, as Superintendent of Insurance of the State of New York, be and the same hereby is in all respects granted, and the said George S. Van Schaick and his successors in office as Superintendents of Insurance of the State of
84 New York be and he is and they are hereby authorized and directed forthwith to take possession of the property and liquidate the business of said Southern Surety Company of New York under and pursuant to the provisions of Article XI of the Insurance Law of the State of New York, and that said Superintendent of Insurance of the State of New York and his successors in office be and he is and they are hereby vested with title to all of the property, contracts and rights of action of the said corporation, and he is and they are hereby directed to deal with the property and business of said corporation in his and their own names as Superin-

tendents of Insurance of the State of New York, and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the Southern Surety Company of New York is insolvent, and it is hereby further

ORDERED, ADJUDGED AND DECREED, that formal notice of the making and entry of this order be given by the Superintendent of Insurance by publication and by mail as hereinafter directed, demanding that all persons indebted to the said corporation render accounts of their indebtedness and to pay any sums due to the liquidator or his successors in office, and to give notice to all stockholders, policyholders and creditors of said Southern Surety Company of New York and all persons having any unsatisfied claim or demand of any character against said Southern Surety Company of New York and a reasonable time and opportunity to file and present proofs of claim with the Superintendent of Insurance or his successors in office and to give notice that all claims presented will be determined and the assets distributed without further notice to persons failing to comply with the aforesaid liquidation notice, and such notice may contain such other rules and regulations as the Superintendent of Insurance or his successors in office may deem necessary and requisite for the purpose of this proceeding, and fixing and determining all lawful and valid debts, claims and demands of creditors, policyholders and stockholders of the said Southern Surety Company of New York, and it is hereby further

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87

ORDERED, ADJUDGED AND DECREED, that the notice aforesaid be given by publication in the Journal

88 *Exhibit A*

of Commerce and Commercial Bulletin commencing on the 28th day of March, 1932, and daily thereafter to the 4th day of April, 1932, and thereafter twice a week for three successive weeks, and on the 18th and 20th days of October, 1932, and by mail by mailing a copy of such notice securely enclosed in a postpaid wrapper addressed to each of the known persons who may have a claim against the Southern Surety Company of New York, at the last known address of such persons as the same may be disclosed by the records of the corporation
89 within ninety days after the entry of this order; and it is hereby further

ORDERED, ADJUDGED AND DECREED, that all persons who may have claims against the Southern Surety Company of New York be notified in the manner hereinabove prescribed to present the same to the Superintendent of Insurance, as liquidator, or his Special Deputy in charge of the liquidation, at a place specified in the said notice, within seven months from the date of the entry of this order, and not later than the 22nd day of October, 1932,
90 and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the notice hereinbefore prescribed is sufficient notice to all persons interested in the assets of the Southern Surety Company of New York, and it is hereby further

ORDERED, ADJUDGED AND DECREED, that said Southern Surety Company of New York, its officers, directors, trustees, policyholders, servants, agents and employees, and all other persons having any property or records belonging to the said Southern

Surety Company of New York, are hereby directed to assign, transfer and deliver to said Superintendent of Insurance of the State of New York and his successors in office, all of such property in whosesoever name the same may be, and that any persons, firms, or corporations having any books, papers or records relating to the business of said Southern Surety Company of New York shall preserve the same and submit them to the Superintendent of Insurance of the State of New York and his successors in office, or his or their agents, for examination at all reasonable times, and it is 92 hereby further.

ORDERED, ADJUDGED AND DECREED, that the officers, directors, policyholders, trustees, agents, servants and employees of said Southern Surety Company of New York, and all other persons be and they hereby are enjoined and restrained from the further transaction of business or from dealing with or disposing of the property or assets of said corporation, or doing or permitting to be done any act or thing which might waste the assets or allow or suffer the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against 93 said corporation or its estate while in the possession and control of the Superintendent of Insurance, his successors in office, or while in liquidation, or at any other time, and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the officers, directors, stockholders, policyholders, servants, agents, employees and creditors of said Southern Surety Company of New York, and all other persons, be and they are hereby enjoined and restrained from bringing or further prosecuting any

94 *Exhibit A*

action at law, suit in equity, special or other proceeding against said corporation or its estate, or the Superintendent of Insurance of the State of New York and his successors in office as liquidator thereof, or from making or executing any levy upon the property or estate of said corporation, or from in any way interfering with the Superintendent of Insurance of the State of New York or his successors in office, in his or their possession, control or management of the property of the said corporation, or in the discharge of his or their
95 duties as liquidators thereof, or in the liquidation of the business of said corporation; and it is hereby further

ORDERED, ADJUDGED AND DECREED, that the corporate charter of said Southern Surety Company of New York be and the same hereby is forfeited, surrendered and annulled, and said Southern Surety Company of New York is hereby dissolved.

Enter,

96 J. F.,
J. S. C.

Exhibit B

Fidelity Department

Bond No.....

SOUTHERN SURETY COMPANY OF NEW YORK

HEAD OFFICE—ST. LOUIS, MO.

PRIMARY BLANKET FIDELITY BOND
Standard Form A

Initial premium on
this bond is $150

KNOW ALL MEN BY THESE PRESENTS, That, in consideration of an annual premium, the SOUTHERN SURETY COMPANY OF NEW YORK (hereinafter called Surety) hereby agrees to indemnify JOHN DEMARTINI CO. INC. of San Francisco, California (hereinafter called Employer) against any and all direct loss or losses of money or other personal property belonging to the Employer or in which the Employer has a pecuniary interest, or held by the Employer as collateral, or as bailee, trustee or agent, and whether or not the Employer is legally liable for the loss thereof which the Employer shall sustain, to an amount not exceeding in the aggregate the sum of TEN THOUSAND AND NO/100 Dollars ($10,000) through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication, or other fraudulent or dishonest act or acts committed by any one or more of the Employees as defined in SECTION A, paragraph 2, acting directly or in collusion with others, during the term of this bond as defined in SECTION A, paragraph 1, and while this bond is in force as to the Employee or Employees causing such loss

100 *Exhibit B*

or losses, and discovered, as provided in SECTION B, paragraph 2, before the expiration of twelve months from the cancellation of this bond as to such Employee or Employees or the cancellation of this bond as an entirety, whichever shall first happen.

This bond is executed and accepted subject to the agreements and limitations set forth in SECTION A of this bond, and the conditions set forth in SECTION B of this bond, which conditions shall be conditions precedent to recovery under this
101 bond.

SECTION A.

1. The term of this bond begins with the 12th day of December, 1930, standard time, at the address of the Employer above given, and ends at 12 o'clock night, standard time, as aforesaid, on the effective date of the cancellation of this bond; and the payment of annual premiums during such term shall not render the amount of this bond cumulative from year to year.

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2. The word "Employees," as used in this bond, shall be deemed to mean all natural persons (except directors of the Employer, if a corporation, who are not also officers thereof) who, on the effective date of this bond, or at any other time during the term of this bond, are in the regular service of the Employer in the ordinary course of the Employer's business, and who are compensated by salary, wages, and/or commissions, and whom the Employer has the right to govern and direct at all times in the performance of such service, and who

Exhibit B 103

are engaged in such service within any of the states of the United States, or within the District of Columbia, the Hawaiian Islands, Alaska, Canada or Newfoundland, but not to mean brokers, factors, commission merchants, consignees, contractors, or other agents or representatives of the same general character.

3. If any natural persons shall be taken into the regular service of the Employer, through merger or consolidation with some other concern, the Employer shall give the Surety written notice 104
thereof; and the Employer shall pay to the Surety additional premium on any increase in the number of Employees covered hereunder as a result of such merger or consolidation computed pro rata from the date of such merger or consolidation to the end of the current premium year.

4. If the Employer shall state an intention to carry fidelity suretyship upon any of the Employees and shall, in any premium computation for this bond, receive credit for such suretyship, then in case a loss shall be sustained through any 105
fraudulent or dishonest act which shall, during the period for which such credit is given, be committed by any Employee covered, or stated to be covered, by such suretyship, the Surety shall be liable under this bond only for so much of said loss as exceeds the amount of fidelity suretyship on such Employee for which such credit has been given.

5. If the Employer shall hold or be entitled to the benefit of any valid and enforceable insurance or suretyship against any loss covered under this

bond, other than the fidelity suretyship, if any, for which credit has been given in accordance with the preceding paragraph, the Surety shall not be liable under this bond for a greater proportion of such loss than the amount of this bond bears to the aggregate amount of this bond and such other insurance or suretyship.

6. Any sum paid in settlement of any loss under this bond shall be deducted from the amount of this bond, such deduction to be effective as of the
107 date upon which the Employer sends to the Surety notice of such loss, and only the remainder of such amount shall apply to other losses resulting from fraudulent or dishonest acts, whether committed before said date or thereafter, or partly before and partly thereafter. The sum so deducted shall be automatically restored as of said date, but only as to losses resulting from fraudulent or dishonest acts committed thereafter; and in consideration of such restoration the Employer shall pay to the Surety, on demand, an additional premium computed pro rata upon the sum so restored from said
108 date of restoration to the end of the premium year. In no event shall the Surety be liable under this bond for an amount greater than that specified in lines 9 and 10 of this bond on account of any one loss or series of losses caused by the fraudulent or dishonest acts of any Employee or combination of Employees.

7. In case any reimbursement be obtained or recovery be made by the Employer or the Surety on account of any loss covered under this bond, the net amount of such reimbursement or recovery, after deducting the actual cost of obtaining or

making the same, shall be applied to reimburse the Employer in full for that part, if any, of such loss in excess of the aggregate of the amounts of all bonds, fidelity insurance, indemnity and security, including this bond, taken by or for the benefit of the Employer and covering such loss, and the balance, if any, or the entire net reimbursement or recovery, if there be no such excess loss, shall be applied to that part of such loss covered by this bond, or, if payment shall have been made by the Surety, to its reimbursement therefor. The Employer shall execute all necessary papers and render all assistance, not pecuniary, to secure unto the Surety the rights provided for in this paragraph. The following shall not be reimbursement or recovery within the meaning of this paragraph: suretyship, insurance or reinsurance; also security or indemnity taken from any source by or for the benefit of the Surety. 110

8. This bond shall be deemed canceled as to any Employee: (a) immediately upon discovery by the Employer, or, if the Employer be a copartnership, by any partner thereof, or, if the Employer be a corporation, by any officer thereof not in collusion with such Employee, of any fraudulent or dishonest act on the part of such Employee; or (b) at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served upon the Employer or sent by registered mail. Such date, if the notice be served, shall be not less than fifteen days after such service, or, if sent by registered mail, not less than twenty days after the date borne by the sender's registry receipt. 111

112 *Exhibit B*

9. This bond shall be deemed canceled as an entirety at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served by the Employer upon the Surety or by the Surety upon the Employer, or sent by registered mail. Such date, if the notice be served by the Surety shall be not less than thirty days after such service, or, if sent by the Surety by registered mail, not less than thirty-five days after the date borne by the sender's registry receipt. In case of cancellation the Surety shall, on demand, refund
113 to the Employer the unearned premium computed pro rata, but such return premium shall be repaid to the Surety in case of payment of a loss under this bond.

SECTION B.

1. No Employee, to the best of the knowledge of the Employer, or, if the Employer be a copartnership, of any partner thereof, or, if the Employer be a corporation, of any officer thereof not in collusion with such Employee, has committed any fraud-
114 ulent or dishonest act in any position in the service of the Employer or otherwise.

2. The Employer shall notify the Surety by telegram or registered letter addressed and sent to it at its Head Office in the City of St. Louis, Missouri, of any fraudulent or dishonest act on the part of any Employee at the earliest practicable moment, and at all events not later than fifteen days after discovery thereof by the Employer, or, if the Employer be a copartnership, by any partner thereof, or, if the Employer be a corporation, by any officer thereof not in collusion with such Employee.

Exhibit B

3. Within ninety days after discovery of any fraudulent or dishonest act as aforesaid, the Employer shall file with the Surety affirmative proof of loss, itemized and duly sworn to, and shall, if requested by the Surety, produce from time to time, for examination by its representatives, all books, documents and records pertaining to such loss.

4. No suit to recover on account of loss under this bond shall be brought before the expiration of three months from the filing of proof as aforesaid on account of such loss, nor after the expiration of twelve months from the discovery as aforesaid of the fraudulent or dishonest act causing such loss.

5. If any limitation in this bond for giving notice, filing claim or bringing suit is prohibited or made void by any law controlling the construction of this bond, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

POLICY OR BOND RIDER

Wherever the words "SOUTHERN SURETY COMPANY" appear hereon, this instrument is hereby amended to read "SOUTHERN SURETY COMPANY OF NEW YORK."

Wherever the words "GENERAL OFFICES, DES MOINES, IOWA, and/or GENERAL OFFICES, ST. LOUIS, MO." appear or when reference is made to any office of the Company, this instrument is hereby amended

118 *Exhibit B*

to read "PACIFIC HEAD OFFICE, SAN FRANCISCO, CALIFORNIA."

SOUTHERN SURETY COMPANY OF NEW YORK,

By J. R. MALONEY
Vice-President.

Countersigned: WESLEY KING,
Attorney-in-Fact.

119 Signed, sealed and dated this 12th day of December, 1930.

SOUTHERN SURETY COMPANY OF NEW YORK,

By WESLEY KING,
WESLEY KING, Attorney-in-fact.

120

Exhibit C

121

FIDELITY AND DEPOSIT COMPANY

OF MARYLAND

BALTIMORE

General Reinsurance Agreement

THIS AGREEMENT, made as of the first day of April, 1930, by and between the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation organized under the laws of the State of Maryland, party of the first part, and the SOUTHERN SURETY COMPANY OF NEW YORK, a corporation 122
organized under the laws of the STATE OF NEW YORK, party of the second part, witnesseth as follows:

1. That the parties hereto may desire from time to time to reinsure with each other, and may so reinsure, Fidelity, Surety, Forgery, Blanket Bond, and other risks or parts thereof;

2. That offerings of such reinsurance may be made by means of instruments executed in duplicate counterparts, of a form substantially agreeing 123
with the sheet attached entitled "Offer of Reinsurance," and made a part hereof;

3. That when such offerings of reinsurance have been accepted by the offeree, as evidenced by the latter's signing of the form of acceptance embodied in the said sheet attached, the reinsurance so effected shall be subject to the "Standard Form of Reinsurance Agreement," adopted by the Surety Association of America on January 15, 1930, here-

124 *Exhibit C*

inafter called the NEW AGREEMENT, attached hereto and made a part hereof;

4. That offerings of reinsurance may be made by ordinary correspondence or orally and may be accepted similarly, and that when such offerings are made and accepted the reinsurance so effected shall be subject to the New Agreement;

5. That all reinsurances between the parties hereto current on the date hereof, including all
125 reinsurances carrying latent, as distinguished from active, liability, on the date hereof, in virtue of agreements executed heretofore upon either the Standard Form of Reinsurance Agreement adopted by the Surety Association of America on May 12, 1915, or the similar Standard Form so adopted and promulgated by the Secretary of the Association on March 13, 1929, or any other form of faculative concurrent reinsurance agreement covering Fidelity and Surety business hereinafter called the OLD AGREEMENTS, be subject, as to losses which have either not occurred at the date hereof or are
126 not now known to either of the parties hereto, or which, while now known to one or both of the parties hereto, have not yet been settled, to the following provisions of the NEW AGREEMENT:

(*a*) The one making the Reinsurer liable for INTEREST, in addition to "costs and expenses" (lines 9 and 18);

(*b*) The one automatically restoring the Reinsurer's initial liability when the reinsured bond is similarly restored (lines 20 tnd 21);

(*c*) The one maintaining the Reinsurer's liability if an agent of the Reinsured changes the reinsured bond or some instrument concerned therewith (lines 96-98).

(*d*) The one giving the Reinsurer a right to reimbursement from the Reinsured in case the former is attacked directly (lines 152-169);

6. That all the said reinsurances between the parties hereto be subject, from the date hereof, to the following provisions of the New Agreement:

(*a*) The one requiring the Reinsured to give the Reinsurer *prompt* written notice of any loss, instead of "immediate" written notice (line 57);

(*b*) The one permitting the Reinsured to consult Reinsurers regarding points falling within the Reinsured's own discretion, without thereby impairing the Reinsured's rights in that respect (lines 66-69);

(*c*) The one prescribing participation by the Reinsurer in bonds issued by the Reinsured in connection with loss settlements (lines 70 and 71);

(*d*) The one defining the cancelation rights of the parties to the Agreement (lines 99-111);

(*e*) The one absolving the Reinsured from liability for subsequent premiums that "prove to be uncollectible" (lines 181 and 182);

(*f*) The one making the arbitration of disagreements compulsory (lines 185 and 192).

130 *Exhibit C*

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be signed by appropriate officers, and their respective corporate seals to be hereunto affixed and duly attested.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By W. N. BISHOP,
Vice-President.

Attest:

131 Frank A. Welsh,
Assistant Secretary.

[SEAL]

SOUTHERN SURETY COMPANY OF NEW YORK

By W. D. DEAN,
Vice-President.

Attest:

Paul Brown,
Assistant Secretary.

132 [SEAL]

Form of bond and Execution
Approved by (signature illegible)

Exhibit C 133

CONTRACT DEPARTMENT

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

Fidelity and Surety Bonds
Burglary and Plate Glass Insurance

BALTIMORE

OFFER OF REINSURANCE

We submit herewith for your consideration reinsurance of $. on the following bond, to 134
take effect simultaneously with the taking effect of the bond.

Principal	Gross Premium
	Rate
Address	Reinsurance commission
	Term
Obligee	State charged
	Accepted by
Address	
Nature of bond	Our bond No. 135
Amount of bond	Form of bond
Amount of contract	Papers submitted
Effective date of bond	
Our retention	Additional information

Very truly yours,

Fidelity and Deposit Company of Maryland,

By.....

136 *Exhibit C*

ACCEPTANCE OF REINSURANCE

Date:

Fidelity and Deposit Company of Maryland,

The above offer is hereby accepted to the extent of Dollars ($), to take effect simultaneously with the taking effect of the bond, subject to the terms of the general re-
137 insurance agreement in force between our two companies. The initial premium is $

Very truly yours,

Reinsurer's No.

138

Form G[illegible] 30199
(Standard Form of Reinsurance Agreement adopted by the Surety Association of America, 1-15-30)

Exhibit C continued

Fidelity and Deposit Company
OF MARYLAND
BALTIMORE

IN CONSIDERATION of the premium payable under section 1 hereof.....
.....
hereinafter called the REINSURER, does hereby reinsure FIDELITY AND DEPOSIT COMPANY OF MARYLAND, hereinafter called the REINSURED, under bond numbered....., together with all riders attached thereto, hereinafter called the BOND, issued by the Reinsured in the penalty of.....
.....Dollars, in favor of.....(obligee), and in behalf of.....
hereinafter called the Principal, against loss thereunder and against costs and expenses, as hereinafter defined, and interest. A copy of the bond is or may be attached hereto, and is hereby made a part of this agreement.

The foregoing agreement is subject to the following conditions and provisions:

1. The premium payable hereunder by the Reinsured to the Reinsurer shall be that proportion of the total premium chargeable for the bond (including additional or renewal premiums) which the amount of the Reinsurer's liability bears to the total liability under the bond, less the commission prescribed by the rules of the Surety Association of America, for.....
term of the bond.....*

2. The Reinsurer's total liability hereunder is limited to.....
.....Dollars and the Reinsurer's proportionate share of costs and of expenses as hereinafter defined and of interest; but the Reinsurer shall in no event be liable hereunder for a greater proportion of any loss, costs, expenses, and interest than the proportion that the amount of reinsurance bears to the amount of the bond. If, however, the bond has a restoration clause, the limit of the Reinsurer's total liability hereunder, whenever that clause becomes operative, shall be correspondingly increased.

3. Unless otherwise expressly agreed, the amount of liability retained by the Reinsured at its own risk both when this agreement is made and at the time of any breach of the bond resulting in a claim thereunder shall be:

(a) If the bond be other than a depository bond or blanket bond, in no event less than the amount ceded hereunder, such retention to be carried under the bond; or

(b) If the bond be a depository bond, in no event less than the amount ceded hereunder plus the amount of all reinsurance ceded by the Reinsured to the Reinsurer under any other depository bond or bonds issued by the Reinsured in behalf of the Principal and effective at the time of any breach of the bond resulting in a claim thereunder, such retention to be carried under any depository bond or bonds issued and/or any depository reinsurance or reinsurances carried by the Reinsured in behalf of the Principal; or

(c) If the bond be a blanket bond, in no event less than the amount ceded hereunder plus the amount of all reinsurance ceded by the Reinsured to the Reinsurer under any other blanket bond or bonds issued by the Reinsured in favor of the same insured and effective at the time of any breach of the bond resulting in a claim thereunder; such retention to be carried under any blanket bond or bonds issued and/or any blanket bond reinsurance or reinsurances carried by the Reinsured in favor of the same insured. The actual retained liability of the Reinsured as aforesaid shall not be more remote than that ceded to the Reinsurer, whether it be primary or excess or partly primary and partly excess.

If it shall be found in the event of a claim that the Reinsured, through inadvertence or error, is not carrying the required amount, or if for the same reason its liability is more remote, the reinsurance shall not completely lapse, but an adjustment shall be made equalizing the difference, the Reinsurer's liability being reduced and the Reinsured's liability increased so that the liability of each shall be equal. A corresponding readjustment shall be made of the reinsurance premium.

If there are two or more reinsurers concerned with the bond whose agreements have been similarly breached, and if the Reinsured shall make with any of them a like adjustment whereby it shall assume as much liability as it must carry hereunder, it shall be deemed to have complied with its retention requirement hereunder.

If the Reinsurer has accepted reinsurance from the Reinsured upon two or more depository bonds issued by the Reinsured in behalf of the Principal, and if a reduction of the Reinsurer's liability thereunder is required by the preceding part of this section, such reduction shall be applied to each of such bonds in the proportion that the reinsurance accepted on each bond bears to the total reinsurance accepted on all such bonds. Likewise where the Reinsurer is carrying both primary and secondary liability ceded by the Reinsured upon blanket bonds in favor of the same insured, then the reduction shall be made proportionately in the same manner for each kind of reinsurance ceded.

It is further provided that any depository bonds issued by the Reinsured other than the bond, or depository reinsurances concerned with the bond accepted by the Reinsured, shall be regarded as non-existent so far as this agreement is concerned if the bonds so issued, or bonds so reinsured, are to the knowledge of the Reinsured secured by collateral or indemnity in a degree substantially different from that incident to the bond, to the extent that such collateral or indemnity proves to be valid and available for its intended use. If, however, the collateral or indemnity is not available, and payment must be made under the bond issued, the reinsurance hereunder shall be payable without regard to such indemnity or collateral but subject only to an obligation on the part of the Reinsured to make a proportionate refund to the Reinsurer if and when and to whatever extent such collateral or indemnity may prove to be valid.

4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer prompt written notice thereof at the Reinsurer's home office. The term "home office," wherever used herein, shall be deemed to mean the home office in the United States. The Reinsured shall take charge of all matters arising under the bond in connection with claims. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims, and defend, settle, or compromise any suits, and take such other action, not involving the extention of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise, or other action of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under some other bond or bonds given at any time by the Reinsured.

The Reinsured's authority to handle and settle claims in accordance with its own judgment as outlined above shall not be annulled, abridged, or otherwise affected if the Reinsured consults the Reinsurer, by letter, in conference, or otherwise, with reference to such handling and settling of claims; provided that the reservation of rights on the part of the Reinsured effected by this paragraph shall apply only to matters and questions, the sole determination of which is left by this agreement in the hands of the Reinsured.

If any loss hereunder shall be settled, wholly or in part, through the issuance by the Reinsured of a surety bond, the Reinsurer shall participate in such bond in the proportion defined in section 2 hereof.

The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date: provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond.

The Reinsurer may inspect the original documents relating to claims and losses under the bond in the possession of the Reinsured.

The term COSTS AND EXPENSES shall mean all expenditures made in investigating and settling any claim under the bond; all expenditures made in investigating, settling, or defending, or attempting to defend, any suit or proceeding based upon the bond; all expenditures made in procuring or attempting to procure restitution or recovery on account of any loss, costs, or expenses; and all expenditures made in prosecuting or attempting to prosecute any person causing a loss under the bond.

5. If the Reinsured shall receive information pertaining to the bond prompting a special investigation, the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in making such investigation and taking any action that it may deem advisable to prevent or diminish a loss under the bond. If the Reinsured finds it necessary or deems it advisable to procure a release from or a cancelation of the bond, the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in effecting or attempting to effect such release or cancelation.

If the bond be a fiduciary, public official, or other instrument reasonably requiring an audit of the principal's accounts the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in auditing such accounts.

The word "expenses" as used in this section shall not be held to include the compensation of any person employed by the Reinsured on salary.

6. In case any change or alteration in the bond, or in any instrument, contract, or agreement concerned with the bond, shall be proposed, the Reinsured shall not make such change or permit such alteration without securing from the Reinsurer's home office

*(If only one premium for all time is payable, complete line 15 with the words, the full. If the annual premium is constant, complete line 15 with the words, each year of the. If there is a graduated premium rate, write before the word "term," in line 15, the first year of the, and complete the line with whatever is appropriate in the given case.)

Exhibit C-Continued

the written consent thereto of the Reinsurer. This section, however, shall be deemed not to apply to any change or alteration made or permitted by an agent of the Reinsured's without knowledge of such change or alteration on the part of any officer or executive located at the home office of the Reinsured.

7. If the Bond contains a valid cancelation clause, then and not otherwise this agreement may be canceled by the Reinsurer at any time by serving upon or sending by registered mail to the Reinsured, at its home office, a written notice stating the latest date upon which the Reinsured shall mail to or serve upon the obligee of the bond a cancelation notice, such date to be not less than fifteen days from such service, or, if such written notice be sent by registered mail, not less than twenty days from the date borne by the sender's registry receipt; and the Reinsured shall give a cancelation notice canceling the bond at the earliest date upon which the bond can be canceled in accordance with its terms. If the Reinsured shall not give notice canceling the bond within the time hereinbefore provided, this agreement shall terminate at the expiration of such period from the date specified in such written notice as shall equal the shortest time for effecting cancelation of the bond in accordance with its terms, except as to losses under the bond that occurred prior to the effective date of cancelation.

The Reinsured may cancel this agreement at any time by notifying the Reinsurer in writing, at the Reinsurer's home office, of such cancelation and the effective date thereof. This effective date shall not be prior to the date of such notification unless the bond has been terminated prior thereto.

In case of cancelation of this agreement the Reinsurer shall be entitled only to a pro rata earned premium.

8. If the bond does not provide in terms for cancelation at any time by the Reinsured, but if in the opinion of the Reinsurer the Reinsured through legal proceedings or otherwise can procure a valid release from liability under the bond, the Reinsurer may require the Reinsured to take the necessary steps to procure such release, by notifying the Reinsured of its desire to terminate its liability and by giving the Reinsured detailed and complete information as to the course that it should take to procure the said release; and if the Reinsured shall fail to institute the necessary proceedings within thirty days from the date on which it has received from the Reinsurer the said notification and the said complete information, and diligently prosecute the same, the liability of the Reinsurer hereunder shall terminate at the expiration of the said thirty days as to any and all subsequent breaches of the bond. In the event of such termination of liability the Reinsurer shall be entitled only to a *pro rata* earned premium.

9. No action shall be brought against the Reinsurer hereunder unless brought within twelve months after the date of the final settlement of all obligations under the bond. If, however, this reinsurance shall end before the termination of the bond, no action shall be brought against the Reinsurer hereunder unless brought within twelve months after the date of the final settlement of all obligations under the bond with which the Reinsurer is concerned.

10. The Reinsurer shall be entitled to share with the Reinsured, in the proportion defined in section 2 hereof, any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond. The Reinsurer and the Reinsured shall share any salvage or recovery except a recovery based on additional agreements of reinsurance, made by either on account of any loss in the proportion defined in section 2 hereof. In case the Reinsured shall carry excess reinsurance on the bond the Reinsurer's share of salvage shall be the same as if no such excess reinsurance were carried.

11. The liability hereunder of the Reinsurer begins*..... and ends, unless this agreement shall be previously canceled in accordance with the terms hereof, with the termination of the liability of the Reinsured. If the liability of the Reinsured by the terms of the bond be continuable for one or more additional periods by the issuance of one or more continuation certificates, the acceptance of an additional premium or premiums, or otherwise, and if the liability be so continued, and if the Reinsurer shall not, at least thirty days before the expiration of the original or of any continued period, have notified the Reinsured in writing, at the latter's home office, of its desire not to continue the reinsurance, this agreement shall apply to such additional period or periods.

12. If the reinsurance hereunder shall be canceled as provided herein before the termination of the bond, the Reinsurer shall not be liable on account of any losses which occurred before the effective date of such cancelation, but which were unknown to the Reinsured at that date, unless notification thereof shall be received by the Reinsured within a period beginning on the effective date of such cancelation and continuing for a term equal to that of the cutoff period, plus the notification period, defined in the bond—that is, the time within which the obligee of the bond must discover any loss indemnifiable thereunder and give the Reinsured notification thereof. If, however, the said notification period is not defined precisely in the bond (as a stated number of days, a "month," or the like), the said notification of a loss unknown to the Reinsured at the effective date of cancelation shall be received by the Reinsured, if the Reinsurer is to be concerned with the loss, within a period beginning on the effective date of such cancelation and continuing for a term equal to that of the cutoff period, plus thirty days.

If the effective date of reinsurance hereunder is subsequent to the effective date of the bond, and if a loss under the bond, or any part thereof, cannot be allocated to the period ending with the effective date of this reinsurance, the date of the discovery of such loss, or the part thereof that cannot be so allocated, shall be deemed to be the date of occurrence.

If reinsurance hereunder supersedes, in whole or in part, any canceled reinsurance, the Reinsurer hereby assumes liability wholly or in *pro rata* part, as the case may be, for losses which occurred before the effective date of the cancelation of such superseded reinsurance, but notification of which was not received by the Reinsured before the expiration of the period specified in the first paragraph of this section.

13. If, under any law, this agreement is required to be in such form as to enable the obligee or beneficiary of the bond to maintain an action hereon against the Reinsured jointly with the Reinsurer, and upon recovering judgment against the Reinsured to have recovery against the Reinsurer for payment to the extent in which it may be liable under this reinsurance and in discharge thereof, then this agreement shall be deemed to be a compliance with such law, and if in consequence thereof either party hereto is forced to pay, on account of loss, attorneys' fees and expenses an amount in excess of its proportion fixed in this agreement, such excess shall be repaid by the other party hereto.

If the Reinsurer be required by any rule or regulation to execute a so-called reinsurance agreement directly in favor of the obligee of the bond, and be forced to make payment under such reinsurance agreement, the amount of such payment, if equal to or less than the amount of the Reinsurer's liability hereunder, shall be credited against such liability, or if greater than such liability shall be repaid by the Reinsured to the extent of such excess.

If any action shall be brought against the Reinsurer under this agreement, or if any letter or paper shall be received by the Reinsurer apparently foreshadowing such action, or otherwise indicating an intention on somebody's part to collect from the Reinsurer a claim, or part of a claim, based upon the bond, the Reinsurer shall promptly notify the Reinsured thereof, and the Reinsured shall thereupon take charge of and completely care for any such action or apparent preliminary procedure; and all costs, attorneys' fees, and expenses incurred by the Reinsured in connection therewith shall be apportioned in accordance with section 2 hereof. If, however, the Reinsurer is compelled to take charge of and care for, wholly or in part, any such action, preliminary procedure, or similar movement directed against the Reinsurer primarily, all payments made by the Reinsurer in connection therewith and for the settlement thereof, including attorneys' fees, interest, and incidental costs, shall be apportioned in accordance with section 2 hereof.

14. Every premium payable by the Reinsured to the Reinsurer shall be an absolute obligation, except as provided in paragraph B of this section, whether or not the Reinsured shall collect from its own debtor the premium on the bond; and such obligation shall be discharged as follows:

(a) The initial premium shall be remitted by the Reinsured to the Reinsurer so as to be in the latter's hands by the last business day of the month in which this agreement is executed, if ninety days have elapsed between the date when the Reinsurer's liability hereunder begins and the date of this agreement; if ninety days have not so elapsed, by the twentieth day of the month following that in which the Reinsured collects the premium from its own debtor, and in any event by the twentieth day of the third month following that in which the Reinsurer's liability hereunder begins.

(b) Subsequent premiums shall be remitted by the Reinsured to the Reinsurer so as to be in the latter's hands by the twentieth day of the month following that in which the Reinsured collects such subsequent premiums from its own debtor, and in any event by the twentieth day of the third month following that in which such subsequent premiums are due to the Reinsured from its own debtor. In case, however, subsequent premiums upon uncancelable bonds prove to be uncollectible, no such subsequent premiums shall be payable by the Reinsured to the Reinsurer.

(c) The validity of this agreement shall be in no wise impaired or affected by the failure of the Reinsured, for any cause, to pay the Reinsurer either the initial premium or any subsequent premium due from the Reinsured to the Reinsurer.

15. This agreement shall be regarded by the parties hereto as an honorable engagement rather than as a mere legal obligation, and if any disagreement shall arise between the parties hereto as to the rights or liabilities incident to this agreement, the question or questions in dispute shall be referred to arbitrators, to be chosen from the managers or officers of bonding companies, as follows:

As soon as one of the parties hereto demands arbitration and names its arbitrator the other party binds itself to name a second arbitrator within three weeks. The two arbitrators so procured shall then select a third person to act as umpire, and the award of any two of such three persons shall be final and conclusive. The arbitration shall be held at some place agreed upon by the parties hereto, or, if they cannot so agree, at some place designated by the arbitrators. The cost of the arbitration shall be borne equally by the parties hereto.

IN WITNESS WHEREOF each of the parties hereto has caused this agreement to be signed by appropriate officers, and their respective corporate seals to be hereunto affixed and duly attested this.....day of

....., 193.....

Attest:

.....

By.....

.....

Attest: FIDELITY AND DEPOSIT COMPANY OF MARYLAND

.....

By.....

*(Line 129 is to be completed, according to circumstance, in one or the other of these ways: simultaneously with that of the Reinsured; on the

.....day of.....19.....)

47

Exhibit C

(PHOTOSTAT)

139

140

141

142

Exhibit D

SOUTHERN SURETY COMPANY OF NEW YORK

PACIFIC HEAD OFFICE—SAN FRANCISCO, CALIF.
333 Montgomery Street

FIDELITY & DEPOSIT COMPANY OF MARYLAND
San Francisco, California

We beg to submit herewith reinsurance of one-half on the following bond to take effect December 12, 1930

Principal Employees
Obligee John DeMartini Co., Inc.
Funds covered — Form Primary, Standard Form A
143 Character of Bond Baby Blanket Bond — Bond No.
Amount of Bond $10,000 — Amt. of Prem. $150
Date of Bond December 12, 1930 — Term Continuous
Retention of Southern Surety Co. of New York $5,000 — Rate Manual

Yours very truly,

SOUTHERN SURETY COMPANY OF NEW YORK

By WESLEY KING
WESLEY KING, Secretary.

[CORPORATE SEAL]

144

Date

Southern Surety Company of New York,
San Francisco, Calif.

The above offer is hereby accepted to the extent of FIVE THOUSAND AND NO/100 ($5,000.00) to take effect December 12, 1930 subject to the terms of the general reinsurance agreement in force between our two companies, the initial premium being $75.

3689084

Yours very truly,

FIDELITY & DEPOSIT COMPANY OF MARYLAND

By D. E. HORTON
Attorney-in-Fact.

Attest
C. A. BEVANS
Agent.

Form G1140--2M, 3-4-30 36496
(Standard Form of Reinsurance Agreement adopted by the Surety Association of America, May 12, 1915.)

Exhibit E No.....

Fidelity and Deposit Company
OF MARYLAND
BALTIMORE

IN CONSIDERATION of the premium stated in Section 1 hereof .....

.....

hereinafter called the Reinsurer, does hereby reinsure the Fidelity and Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered ....., hereinafter called the bond, issued by the Reinsured in the penalty of ..... Dollars, in favor of .....

[obligee], and in behalf of .....
[principal], against loss thereunder and against costs and expenses, as hereinafter defined. A copy of the bond is or is to be attached hereto, and is hereby made a part of this agreement.

The foregoing agreement is subject to the following conditions:

1. The premium payable hereunder by the Reinsured to the Reinsurer shall be .....

..... Dollars, less thirty per cent for

..... term of the bond

.....

2. The Reinsurer's total liability hereunder, hereinafter called the Reinsurance, is limited to .....

..... Dollars, and the Reinsurer's proportionate share of costs as defined in Condition numbered 5 hereof and of expenses as described in Condition numbered 6 hereof; but the Reinsurer shall in no event be liable hereunder for a greater proportion of any loss, costs, and expenses than the proportion that the amount of reinsurance bears to the amount of the bond.

3. The amount of liability retained by the Reinsured at its own risk under the bond while this agreement remains in force shall in no event be less than .....

..... Dollars [$].

4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer immediate written notice thereof at the Reinsurer's home office. The term home office wherever used herein shall be deemed to mean the home office in the United States.

5. The Reinsured shall take charge of all matters arising under the bond. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims, and defend, settle, or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise, or other action of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under any other bond or bonds given at any time by the Reinsured.

The Reinsurer's proportionate share of a loss under the bond, and of costs as hereinafter defined, shall be paid to the Reinsured upon proof of such loss and costs, and proof of the payment thereof by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to pay its proportionate share of such loss before such date; but in that case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond.

The Reinsurer may inspect the original documents relating to claims and losses under the bond in the possession of the Reinsured.

The term costs shall mean all expenditures made in investigating and settling any claim under the bond; all expenditures made in investigating, settling, or defending, or attempting to defend, any suit or proceeding based upon the bond; all expenditures made in procuring or attempting to procure restitution or recovery on account of any loss, costs, or expenses; all expenditures made in prosecuting or attempting to prosecute any person causing a loss under the bond; but the term costs shall not be held to include the compensation of any person employed by the Reinsured on salary.

6. If the Reinsured shall receive information about the subject of the bond prompting a special investigation, the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in making such investigation and taking any action that it may deem advisable to prevent or diminish a loss under the bond.

In the case of fiduciary and public official bonds the Reinsurer shall pay the Reinsured a proportionate share of any expenses incurred by the Reinsured in auditing the account of the principal under the bond.

7. In case any change or alteration in the bond, or in any instrument, contract, or agreement concerned with the bond, shall be proposed, the Reinsured shall not make such change or permit such alteration without securing, from the Reinsurer's home office, the consent thereto of the Reinsurer in writing. If such consent be given, and the change or alteration be made, the Reinsured shall give notice thereof in writing to the Reinsurer, at the Reinsurer's home office.

---

*(If only one premium for all time is payable, complete line 13 with the words, **the full.** If the annual premium is constant, complete line 13 with the words, **each year of the.** If there is a Graduated premium rate, write before the word "term" in line 13 **the first year of the** and in line 14 whatever is appropriate in the given case.)

Exhibit E - Continued

This section, however, shall be deemed not to apply to any immaterial change or alteration made or permitted by an agent of the Reinsured's without knowledge of such change or alteration on the part of any officer or executive located at the home office of the Reinsured.

8. If the bond provides in terms for cancelation at any time by the Reinsured, then, and not otherwise, this agreement may be canceled by the Reinsurer at any time by a written notice stating when the cancelation takes effect, served on the Reinsured, or sent by registered mail to the Reinsured at its home office, at least forty days prior to the date when the cancelation takes effect. In case of such cancelation the Reinsurer shall be entitled only to the earned premium pro rata.

9. If the bond does not provide in terms for cancelation at any time by the Reinsured, but if in the opinion of the Reinsurer the Reinsured through legal proceedings or otherwise can procure a valid release from liability under the bond, the Reinsurer may require the Reinsured to take the necessary steps to procure such release, by notifying the Reinsured of its desire to terminate its liability and by giving the Reinsured detailed and complete information as to the course that it should take to procure the said release; and if the Reinsured shall fail to institute the necessary proceedings within thirty days from the date on which it has received from the Reinsurer the said notification and the said complete information, and diligently prosecute the same, the liability of the Reinsurer hereunder shall terminate at the expiration of the said thirty days as to any and all subsequent breaches of the bond. In the event of such termination of liability the Reinsurer shall be entitled only to the earned premium pro rata. If a release from liability is procured, or if an attempt is made to procure a release through legal or other proceedings, undertaken at the instance of either the Reinsurer or the Reinsured, the Reinsurer shall share the cost of such proceedings, aside from the cost included in the compensation of any person employed on salary by the Reinsured, in the proportion that the amount of the reinsurance bears to the amount of the bond.

10. No action shall lie against the Reinsurer hereunder unless brought within twelve months after the date of the final settlement of all obligations under the bond.

11. The Reinsurer shall be entitled to share with the Reinsured, in the proportion that the amount of the reinsurance bears to the amount of the bond, any collateral security or indemnity held by the Reinsured, or any right of action possessed by the Reinsured, in connection with the bond. The Reinsurer and the Reinsured shall share any salvage or recovery, except a recovery based on additional agreements of reinsurance, made by either on account of any loss in the proportion that the amount of the reinsurance bears to the amount of the bond.

12. The liability hereunder of the Reinsurer begins .....

.....

and ends with the termination of the liability of the Reinsured. If the liability of the Reinsured, by the terms of the bond, be continuable by the issuance of a continuation certificate, and if the liability be so continued, and if the Reinsurer shall not thirty days previously have notified the Reinsured, in writing at the latter's home office, of its desire not to continue the reinsurance, this agreement shall apply to such continuation of liability for one year.*

13. Every premium payable by the Reinsured to the Reinsurer shall be an absolute obligation, whether or not the Reinsured shall collect from its own debtor the premium on the bond; and such obligation shall be discharged as follows:

A. The initial premium shall be paid —by the tenth day of the month following that in which this agreement is executed, if ninety days have elapsed between the date of the bond and the date of this agreement; if ninety days have not so elapsed, by the tenth day of the month following that in which the Reinsured collects the premium from its own debtor, and in any event by the tenth day of the fourth month after the date of the bond.

B. Subsequent premiums shall be paid by the tenth day of the month following that in which the Reinsured collects such subsequent premiums from its own debtor, and in any event by the tenth day of the fourth month after the date on which such subsequent premiums are due to the Reinsured from its own debtor. In case, however, subsequent premiums upon uncancelable bonds cannot be collected by the Reinsured because of the insolvency of the Reinsured's principal, prior to the time stipulated for payment herein, no such subsequent premiums shall be payable by the Reinsured to the Reinsurer.

The validity of this agreement shall be in no wise impaired or affected by the failure of the Reinsured, for any cause, to pay the Reinsurer either the initial premium or any subsequent premium due from the Reinsured to the Reinsurer.

IN WITNESS WHEREOF the .....

..... *has caused this contract*

to be signed by its ..... *and its corporate*

seal to be hereunto annexed, attested by its .....

this ..... *day of* ....., *193*....

145

Exhibit E

(PHOTOSTAT)

146

147

148 *Bill of Exceptions*

At the trial of this cause such proceedings were had, such evidence was offered and introduced, such motions were made by the defendant, such rulings thereon were made by the Court and such exceptions were taken at the respective times of such rulings as hereinabove indicated.

Inasmuch as the matters and things above set forth do not fully appear of record, the defendant tenders and presents the foregoing as its bill of exceptions in this cause and prays that the same may be approved, settled, allowed, signed, sealed,
149 filed and made a part of the record in this cause by this Court.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant.

150

Stipulation as to Bill of Exceptions 151

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties 152
hereto that the foregoing bill of exceptions contains all of the proceedings had, evidence offered or introduced, motions made by the defendant, rulings thereon made by the Court and exceptions to such rulings taken by the defendant, at the trial of this cause; that said bill of exceptions is correct in all respects; and that the same may be approved, settled, allowed, signed, sealed, filed and made a part of the record in this cause by the Court upon the filing of this stipulation without further or other notice to the plaintiff.

Dated, New York, N. Y., August 5, 1936. 153

EUGENE M. CLENNON,
Attorney for Plaintiff.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant.

154 **Certificate and Order Settling Bill of Exceptions**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Upon reading the foregoing stipulation, it is

155 CERTIFIED AND ORDERED that the foregoing bill of exceptions contains all of the proceedings had, evidence offered or introduced, motions made by the defendant, rulings thereon made by the Court and exceptions to such rulings taken by the defendant, at the trial of this cause; that said bill of exceptions is correct in all respects; and that the same is hereby approved, settled and allowed and is hereby ordered on file and made a part of the record herein as the defendant's bill of exceptions in this cause.

156 Dated, New York, N. Y., September 26th 1936.

ALFRED C. COXE,
U. S. D. J.

Consent is hereby given to the form of the foregoing certificate and order.

EUGENE M. CLENNON,
Attorney for Plaintiff.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant.

Extract from Clerk's Minutes 157

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court House and Postoffice Building in the Borough of Manhattan, City of New York, on the 22nd day of June in the year of our Lord, One Thousand Nine Hundred and Thirty-six.

Present:

HONORABLE ALFRED C. COXE, *District Judge.*

158

[SAME TITLE]

Now comes the Plaintiff, by E. M. Clennon, I. Waldman of Counsel, and moves the trial of this cause. Likewise comes the Defendant, by Hughes, Schurman & Dwight, H. L. Smith of Counsel. Thereupon a Jury is duly impaneled and sworn, and the cause proceeds to Trial. Stipulation filed waiving Jury. Counsel for plaintiff opens to the Court and rests on stipulation. Attorney for defendant opens and moves to dismiss. Denied. Defendant rests and renews motion to dismiss and for judgment. 159

Case closed, argued and submitted. Decision reserved.

July 9—filed opinion No. 9931, Coxe, *J.* Judgment for plaintiff for $3,522.71 with interest from November 17, 1933 together with costs.

CHARLES WEISER,
Clerk

(An Extract of the Minutes.)

160

Opinion

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Appearances:

161 EUGENE M. CLENNON, Esq., Attorney for Plaintiff;
(Irvin Waldman, Esq. of Counsel).

Messrs. HUGHES, SCHURMAN & DWIGHT, Attorneys for Defendant;
(Ralph S. Harris, Harold L. Smith, E. Myron Bull and William L. Wilkinson, Esqs., of Counsel).

COXE, *D.J.*:

This is an action by the Superintendent of Insurance of the State of New York, as liquidator of Southern Surety Company of New York, against
162 the defendant, to recover the sum of $3,522.71 with interest from November 17, 1933, upon a reinsurance agreement entered into between Southern Company, during its existence, and the defendant.

The case was tried by the court without a jury on an agreed statement of facts.

The Southern Company was organized in New York State and had authority to do a surety and insurance business. On March 22, 1932, it was declared insolvent by order of the Supreme Court of New York, its charter annulled, and title to its assets vested in the Superintendent of Insurance, with instructions to liquidate the company.

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Prior to its insolvency, the Southern Company had in the regular course of its business issued its fidelity bond to one John De Martini Co., Inc., by which it bound itself to indemnify that company for any pecuniary loss which it might sustain through the fraudulent or dishonest acts of its employees during the term of the bond.

While the bond was in effect, John De Martini Co., Inc. sustained a loss of $7,045.41 as a result of the fraudulent and dishonest acts of one of its employees, for which it filed a proof of loss with the Southern Company. This claim was in the process 164
of examination and investigation when the Superintendent took charge, and the claim was thereafter allowed in the liquidation proceeding in the sum of $7,045.41.

On the same day the Southern Company issued its fidelity bond to the De Martini Company, the defendant reinsured the Southern Company to the extent of one-half its liability on the bond, not exceeding the sum of $5,000.00. This reinsurance was expressly made subject to the terms of a general reinsurance agreement existing between the Southern Company and the defendant, and it is 165
on this agreement that the plaintiff now seeks to recover the sum of $3,522.71, which is one-half of the admitted liability of the Southern Company on its bond.

The defendant contends that under the terms of the reinsurance agreement, actual payment of the loss to the De Martini Company is a prerequisite to recovery, and that the defendant is then liable only to the extent of one-half of the amount actually paid. The plaintiff, on the other hand, insists that inasmuch as the Southern Company is in liquidation, the defendant is liable for one-half of the

166 *Opinion*

claim, irrespective of whether the plaintiff pays the claim in full or only a liquidation dividend thereon.

The question presented has been determined adversely to the contention of the defendant in a long line of decisions, which have consistently held that under an ordinary agreement of reinsurance, the obligation of a reinsurer is to indemnify the reinsured not against payment actually made but against liability actually incurred. *Allemannia* v. *Firemen's,* 209 U. S. 326; *Hicks* v. *Poe,* 269 U. S. 118; *Hone* v. *Mutual,* 1 Sandf. Sup. C. R. 137,
167 aff'd 2 N. Y. 235; *Blackstone* v. *Allemannia,* 56 N. Y. 104; *Cashau* v. *Northwestern,* Fed. Cas. No. 2499; *Fame Ins. Co.'s Appeal,* 83 Pa. State 396; Vance on Insurance, 2d Ed. pages 942, 946.

In *Allemannia* v. *Firemen's* (*supra*), Mr. Justice Peckham said at page 332 of the opinion, as follows:

> "The term 'reinsurance' has a well-known meaning. That kind of a contract has been in force in the commercial world for a long number of years, and it is entirely different from what is termed 'double insurance', i.e., an in-
> 168 surance of the same interest. The contract is one of indemnity to the person or corporation reinsured, and it binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured or by its in-

ability to fulfill its own contract with the original insured. The claim of the reinsured rests upon its liability to pay its loss to the original insured, and is not based upon the greater or less ability to pay by the reinsured."

The defendant attempts to distinguish these cases on the ground that the agreements are dissimilar. But a careful comparison of the present agreement with the agreement in *Allemannia* v. *Firemen's* (*supra*) discloses no essential difference 170
in so far as the question under consideration is concerned. In the Allemannia case, the payment clause provided that the reinsurer would in no event be "liable for an amount in excess of a ratable proportion of the sum *actually paid* to the assured". Yet the Supreme Court held that the receiver of the reinsured could recover without actual payment to the assured. The analogous clause of the present agreement provides that the reinsurer's proportionate share of a loss "shall be paid to the reinsured upon proof of the payment * * * by the reinsured". There is no substantial 171
difference between these two provisions, even though the present agreement requires "proof of the payment", where payment has been made.

I think, also, that the entire phraseology of the agreement indicates that no departure from the settled law of the Allemannia case was intended. In the first place, the agreement itself declares that it is to be regarded "as an honorable engagement rather than as a mere legal obligation". Then, too, the reinsured is alone authorized to determine its liability on the bond, and settle all claims, subject to the right of the reinsurer later

to show "that the alleged liability or any part thereof for loss under the bond exists or existed under some other bond or bonds given at any time by the reinsured". Finally, it is provided that no action shall be brought against the insurer "unless brought within twelve months after the date of the final *settlement* of all obligations under the bond". Surely, if it had been intended to make actual payment of the claim a prerequisite to recovery where the reinsured was in liquidation, it is reasonable to suppose that unequivocal language to that effect
173 would have been used. I hold, therefore, that the words "proof of the payment" mean either proof that the reinsured has paid or is "bound to pay according to its policy". *Cashau* v. *Northwestern* (*supra*).

There may be a judgment for the plaintiff for $3,522.71, with interest from November 17, 1933, together with costs.

July 9, 1936.

(sgd) ALFRED C. COXE
U. S. D. J.

174

Judgment 175

IN THE

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT.

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before Hon. Alfred C. Coxe, District Judge, without a jury pursuant to a written stipulation herein filed, at a 176
Term of this Court held at the United States District Courthouse of the Southern District of New York, on the 22nd day of June, 1936, and Irvin Waldman of Counsel (Eugene M. Clennon, attorney) having appeared for the plaintiff and Harold L. Smith, of Counsel (Hughes, Schurman & Dwight, attorneys) having appeared for the defendant, and an agreed statement of facts having been submitted to the Court, and the defendant having moved at the close of the plaintiff's case, and at the close of the whole case, to dismiss the complaint and to non-suit the plaintiff on the merits on the ground that the pleadings and the agreed statement 177
of facts do not as a matter of law afford support for a judgment for the plaintiff, and at the close of the whole case to dismiss the complaint and to non-suit the plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for the plaintiff, and at the close of the whole case for judgment for the defendant on all the grounds open to the defendant on the issues and pleadings and all of said motions having been denied and the defendant having duly excepted thereto, and the Judge having duly rendered a ver-

178 *Judgment*

dict in favor of the plaintiff and against the defendant in the sum of Three Thousand Five Hundred Twenty-Two and 71/100 ($3,522.71) Dollars, with interest from November 17, 1933, together with costs, and the costs of the said plaintiff having been duly taxed at Twenty-Five and 00/100 ($25.00) Dollars;

Now, on motion of Eugene M. Clennon, attorney for the plaintiff, it is

179 ADJUDGED that the plaintiff, Louis H. Pink Superintendent of Insurance of the State of New York; of 111 John Street, New York City as Liquidator of the Southern Surety Company of New York, recover of the defendant, Fidelity and Deposit Company of Maryland, the sum of Three Thousand Five Hundred Twenty-Two and 71/100 ($3,522.71) Dollars, together with interest amounting to Five Hundred Seventy-Seven and 89/100 ($577.89) Dollars, totaling Four Thousand One Hundred and 60/100 ($4,100.60) Dollars, together with Twenty-Five and 00/100 ($25.00) Dollars costs as taxed, making in all the sum of Four Thousand One Hun-
180 dred Twenty-Five and 60/100 ($4,125.60) Dollars, and that the plaintiff have execution therefor.

JUDGMENT signed and entered this 20th day of August, 1936.

CHARLES WEISER,
Clerk.

We hereby consent to the form of the foregoing judgment, and waive notice of entry.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant.

Petition for Appeal

181

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To the Honorable the District Judges of the United States District Court for the Southern District of New York:

Your petitioner, Fidelity & Deposit Company of Maryland, defendant in the above entitled cause, 182
hereby prays that it be permitted to take an appeal from the final judgment entered in this cause on the 20th day of August, 1936, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith; that said appeal be allowed; that a citation be issued in accordance with law; that a duly authenticated transcript of the record and proceedings in this cause be transmitted to said United States Circuit Court of Appeals; that the amount of security to be given by appellant in order that said appeal shall operate 183
as a supersedeas be fixed; and that, upon the giving of said security, said appeal operate as a supersedeas.

Dated, New York, N. Y., September 24, 1936.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Defendant,

By HUGHES, SCHURMAN & DWIGHT,
Its Attorneys,
Office & Post Office Address:
100 Broadway,
New York, N. Y.

HAROLD L. SMITH,
Of Counsel.

184 **Assignment of Errors**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Comes now Fidelity & Deposit Company of Maryland, defendant in the above entitled cause, and files the following assignment of errors upon
185 which it will rely in the prosecution of the appeal herewith petitioned for from the final judgment entered in this cause on the 20th day of August, 1936:

1. The District Court erred in denying defendant's motion, made at the close of plaintiff's case and renewed at the close of the whole case, to dismiss the complaint and to non-suit plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for plaintiff.

2. The District Court erred in denying defend-
186 ant's motion, made at the close of the whole case, to dismiss the complaint and to non-suit plaintiff on the merits on the ground that the pleadings and the agreed statement of facts do not as a matter of law afford support for a judgment for plaintiff.

3. The District Court erred in denying defendant's motion made at the close of the whole case for judgment for defendant.

4. The District Court erred in holding that upon the pleadings, proceedings and proof plaintiff is entitled to judgment against defendant.

5. The District Court erred in not holding that delivery of proof of the payment by the reinsured of the loss under the bond referred to in the agreement sued upon is a condition precedent to any obligation on the part of the reinsurer to pay reinsurance under such agreement, except where the reinsured gives written notice of its intention to pay the loss on a certain date and requires payment of the reinsurance by that date.

6. The District Court erred in not holding that the obligation of the reinsurer to the reinsured 188
under the agreement sued upon is merely to indemnify the reinsured against one-half of any loss which it may suffer under the bond referred to in such agreement.

7. The District Court erred in not holding that, not having paid the claim on the bond referred to in the agreement sued upon, the reinsured has suffered no loss under such bond.

8. The District Court erred in holding that the agreement sued upon is an agreement to indemnify the reinsured against one-half of any liability it 189
may incur under the bond referred to in such agreement.

Dated, New York, N. Y.,
September 24, 1936.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for Defendant,
Office & Post Office Address:
100 Broadway,
New York, N. Y.

HAROLD L. SMITH,
Of Counsel.

190

Order Allowing Appeal, with Supersedeas

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

191 The petition of Fidelity & Deposit Company of Maryland, defendant in the above entitled cause, for an appeal from the final judgment entered in this cause on the 20th day of August, 1936, is hereby granted and said appeal is allowed upon the petitioner filed a bond in the sum of Four Thousand Six Hundred Twenty-three and 14/100 Dollars ($4,623.14) with sufficient sureties conditioned as required by law, whereupon said appeal shall operate as a supersedeas.

Dated, New York, N. Y.
September 26, 1936.

192

ALFRED C. COXE,
U. S. D. J.

193

Citation

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

By the Hon. Alfred C. Coxe, one of the U. S. District Judges, for the Southern District of New York, in the Second Circuit: 194

To:

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York,

GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, State of New York, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the office of the Clerk of the United States District Court for the Southern District of New York, wherein Fidelity & Deposit Company of Maryland is appellant and you are appellee, to show cause, if any there be, why the judgment appealed from should not be corrected and why speedy justice should not be done to the parties in that behalf. 195

196 *Citation*

WITNESS the HONORABLE ALFRED C. COXE, Judge of the United States District Court for the Southern District of New York this 26th day of September, 1936.

ALFRED C. COXE,
U. S. D. J.

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197 Copy received September 30, 1936.

E. M. CLENNON,
Attorney for Superintendent
as Liquidator, etc.

198

Stipulation for Enlargement

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by the respective attorneys, that the time of the appellant herein to docket its appeal and to have certified and to file the record thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including October 28, 1936, and that an order to that effect may be entered upon the filing of this stipulation without further or other notice to the plaintiff.

Dated: New York, N. Y., October 23, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant-Appellant.

202

Order of Enlargement

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Upon reading and filing the stipulation annexed hereto, it is

203 ORDERED, that the time of the appellant herein to docket its appeal and to have certified and to file the record thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be and it hereby is extended to and including October 28, 1936.

Dated: New York, N. Y., October 24, 1936.

CHARLES WEISER,
Clerk, United States District Court,
Southern District of New York.

204

We hereby consent to the entry of the foregoing order.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant-Appellant.

Stipulation and Order of Enlargement 205

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by the respective attorneys, that the time of the appellant herein to docket its appeal and to have certified and to file the record thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including November 4, 1936. 206

Dated: New York, N. Y., October 27, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant-Appellant. 207

So ordered: October 28th, 1936.

CHARLES WEISER,
Clerk, United States District Court,
Southern District of New York.

208 **Stipulation and Order of Enlargement**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, that the time of the appellant herein to docket
209 its appeal and to have certified and to file the record thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including November 12, 1936.

Dated: New York, N. Y., November 2nd, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
210 Attorneys for Defendant-Appellant.

So ordered: November 4, 1936.

CHARLES WEISER,
Clerk, United States District Court,
Southern District of New York.

Stipulation and Order of Enlargement

211

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys, that the time of the appellant herein to docket its appeal and to have certified and to file the record 212 thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit be extended to and including November 17, 1936.

Dated, New York, N. Y., November 10, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee.

HUGHES, SCHURMAN & DWIGHT,
By HAROLD L. SMITH,
Attorneys for Defendant-Appellant. 213

So ordered: November 12, 1936.

CHARLES WEISER
Clerk of U. S. District Court
Southern District of New York.

214

Defendant-Appellant's Praecipe

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To Honorable CHARLES WEISER,
Clerk of the United States District Court for the
Southern District of New York:

215

You will please incorporate in the transcript of record on appeal to the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, the following papers and exhibits, and no others, to wit:

1. Statement under Rule XIII.
2. Summons.
3. Complaint.
4. Stipulation for amendment of answer dated April 24, 1936.

216

5. Amended answer.
6. Stipulation waiving jury trial dated March 30, 1936.
7. Stipulation of facts.
8. Bill of exceptions, with exhibits included therein, as approved, settled and allowed by order of Hon. Alfred C. Coxe, dated September 26, 1936 and filed September 28, 1936.
9. Stipulation as to bill of exceptions.

Defendant-Appellant's Praecipe 217

10. Certificate and order settling bill of exceptions.
11. Extract from Clerk's minutes.
12. Opinion of Hon. Alfred C. Coxe.
13. Judgment.
14. Petition for appeal.
15. Assignment of errors.
16. Order allowing appeal, with supersedeas. 218
17. Citation with admission of service.
18. Stipulations and orders enlarging time for docketing of appeal and filing of record.
19. This praecipe with admission of service thereon.
20. Plaintiff-Appellee's praecipe or objections.
21. Any order which may be entered settling the transcript of record on appeal.
22. Stipulation as to record.
23. Clerk's certificate. 219

Dated, October 31, 1936.

HUGHES, SCHURMAN & DWIGHT,

By HAROLD L. SMITH,
Attorneys for Defendant-Appellant.

220 **Plaintiff-Appellee's Counter-Praecipe**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To Honorable CHARLES WEISER,
Clerk of the United States District Court for the
221 Southern District of New York:

Sir:

PLEASE incorporate in the transcript of record on appeal to the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, the following papers and exhibits in addition to the matter requested by the defendant-appellant to be included in the said record, to wit:

Stenographic transcript of the trial of said action before Hon. Alfred C. Coxe, District Judge, on June 22nd, 1936.

222

Dated: November 2nd, 1936.

ALFRED C. BENNETT,
Attorney for Plaintiff-Appellee,

By IRVIN WALDMAN,
Of Counsel.

Order Settling Transcript of Record On Appeal

223

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Defendant, by an Order to Show Cause dated November 5, 1936, having moved this Court for an order settling and allowing defendant's praecipe as filed, disallowing and denying the request made in plaintiff's praecipe that the stenographic transcript of the trial be printed and directing the Clerk of this Court to incorporate in the transcript of record on appeal the papers named in defendant's praecipe, and no others, and to certify the record as so printed as a true transcript of the record of this Court in this cause, and said motion having duly come on to be heard before me in Chambers on the 6th day of November, 1936,

224

Now, upon said Order to Show Cause, the affidavit of Harold L. Smith, sworn to November 5, 1936, in support thereof, the affidavit of Irvin Waldman, sworn to November 5, 1936, in opposition thereto, the praecipe filed by defendant on October 31, 1936, the counter-praecipe filed by plaintiff on November 4, 1936, and upon all the papers and proceedings had herein, and after hearing argument of counsel, and due deliberation having been had,

225

On motion of Hughes, Schurman & Dwight, attorneys for defendant, it is

226 *Order Settling Transcript of Record on Appeal*

ORDERED that said motion be, and the same hereby is granted to the extent of settling the transcript of record on appeal on the basis of defendant's praecipe; and it is further

ORDERED that the transcript of record on appeal in this cause shall contain the papers and matters set forth in defendant's praecipe, and no others.

Dated, New York, November 12, 1936.

227 ALFRED C. COXE
U. S. D. J.

228

229

Clerk's Certificate

I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record and proceedings had in said Court in the above entitled matter, pursuant to the praecipe filed by defendant and settled and allowed by order of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York this 17th day of November, in the year of our Lord, One thousand nine hundred and thirty-six, and of the Independence of the United States the One hundred and ~~sixtieth~~ sixty-first.

230

CHARLES WEISER
Clerk.

231

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1936

Argued Feb. 10, 1937. Decided March 8, 1937

No. 256

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the Southern Surety Company of New York, Appellee,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Chase, Circuit Judges.

Appeal by the defendant from a judgment of the District Court for the Southern District of New York in an action upon a reinsurance agreement.

Harold L. Smith, of New York City, for appellant.
Irvin Waldman, of New York City, for appellee.

L. HAND, Circuit Judge:

This appeal is from a judgment entered upon stipulated facts in an action to recover upon an agreement of reinsurance. The plaintiff is the liquidator of an insolvent surety company, and it is agreed that the agreement would cover the loss for which he sues, if it had been paid, which of course it has not and never will be. The only question is whether the defendant's promise was limited to indemnifying the reinsured—the insolvent company—for losses actually paid by it. Both sides agree that the reinsured's insured—the person suffering the loss—has no recourse over against the reinsurer, the defendant, and it follows that any recovery will be for the benefit of all the reinsured's creditors, an asset to be distributed in liquidation.

The agreement incorporated the "Standard Form of Reinsurance Agreement" adopted by the Surety Association of America on January 15, 1930, which was in turn an amendment of an earlier form, prepared in 1915. The record does not say what the Surety Association of America

was, but we do not step beyond permissible limits of judicial notice when we assume that it was a group of companies engaged in the same business as both the companies here in question. The form begins with a promise to "reinsure * * * against loss * * * as hereinafter defined," upon which follow the conditions to which "the foregoing agreement is subject." The fourth article of these provide that "the Reinsured, upon the receipt * * * of a notice of any claim or loss, * * * shall give the Reinsurer prompt written notice," but the reinsured shall decide whether it is liable for the amount, and shall settle the claim or defend against it, and its action shall conclude the reinsurer. Then follow the critical words: "The Reinsurer's proportionate share of a loss * * * shall be paid * * * upon proof of payment * * * by the Reinsured and upon delivery to the Reinsurer of copies of all essential documents con- [fol. 79] cerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss at a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date"; though the reinsurer may if it chooses pay its share direct to the insured. There are other provisions, as for example those relating to the apportionment of any collateral, which go to confirm the conclusion that the agreement did not subject the reinsurer to any liability except for a loss actually paid by the reinsured; but we need not consider them because we shall take it arguendo—and indeed we cannot see how it could be taken otherwise—that, as a new question, payment of the loss was a condition upon the reinsurer's obligation. Were it not for circumstances which seem to us conclusive, we should have felt ourselves obliged to read the promise in the defendant's sense.

The controlling fact is the decision of the Supreme Court in Allemannia Ins. Co. v. Firemen's Insurance Co., 209 U. S. 326, 28 S. Ct. 544, 545, 52 L. Ed. 815, 14 Ann. Cas. 948, in which there was a clause on whose similarity to, and difference from, the fourth article of the agreement in suit the result at bar must turn. The reinsured undertook in the tenth article of the agreement before the Supreme Court, upon receiving notice of any loss or claim promptly to advise the reinsurer, and promised that, after it had "adjusted, accepted proofs of, or paid such loss or damage, it

shall forward * * * proof of its loss and claim * * * together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss." The use of the particle, "or," seemed indeed to say that the reinsured might recover without paying the claim—that is, by only adjusting the loss or accepting proofs of it; but it is hard to see how the reinsured could in that event present a copy of a receipt for payment. Be that as it may, the eleventh article of the agreement concluded as follows: "in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the reinsured company." That certainly precluded taking the disjunctive as giving the reinsured any option. The court's general reasoning was that reinsurance was an old and familiar transaction; that its incidents were well understood; and that the authorities who had discussed it had uniformly treated the reinsurer's liability as conditional, not upon the reinsured's loss, but upon his liability. The opinion then dealt at some length with a "pro rata clause" in the eleventh article; but somewhat strangely, ignored the accompanying language which we have just quoted, and which was much more compelling. It dismissed the tenth article by italicizing the conjunction, "or," and declaring that the requirement as to forwarding a copy of the receipt was to be allocated solely to cases where the reinsured has paid. The opinion concluded that the two clauses could not mean "to entirely nullify and tear up by the roots the construction given to the contract of reinsurance for so many years throughout the civilized world and upon which its chief value is based. The nature of the contract is accurately described in its commencement. It is described as a 'compact of reinsurance;' and there has been no doubt as to the meaning of such contract for the last two centuries." 209 U. S. 326, at page 337, 28 S. Ct. 544, 548, 52 L. Ed. 815, 14 Ann. Cas. 948.

The defendant quite naturally bears heavily upon the court's reliance upon the disjunctive; and if the case at bar arose over a contract written before 1908 we might yield to that difference, regardless of the passage in the eleventh article which we have quoted, and which the court apparently did not consider; though even then the general language would remain a powerful reason the other way. But

the contract at bar was prepared long after that decision was rendered. In 1915 a new "standard form" had been prepared, as we have said; it was almost literally the same as the form of 1930; and while neither form took the agreement which had been before the Supreme Court as a model, the substance of each was the same except for the change to the copula. That difference was certainly not enough to show any change in intent, if we assume that the decision was before the draughtsmen of the form of 1915 or of 1930; for it is quite impossible that they should in that event have contented themselves with so uncertain and slight a substitution. It is not therefore a question of following the dicta [fol. 80] of an opinion; no careful draughtsmen, who wished another result, would have left so at large a document prepared for general use in all such transactions. On the other hand, it is scarcely possible to suppose that when the forms were prepared, they did not know of the decision. The record does indeed say nothing about the preparation of either form; all we know is that these companies chose to adopt it, and that it was the product of some kind of association of surety companies to which they belonged. Perhaps it goes too far to suppose that such a body acquaints itself with the decisions of every state; for this reason we forbear relying upon Globe National Fire Insurance Co. v. American Bonding & Casualty Co. (1923), 198 Iowa, 1072, 195 N. W. 728, 200 N. W. 737, 35 A. L. R. 1341, which construed the very form of 1915 adversely to the defendant, though it is probable that that decision also was known. But to say that the only decision of the Supreme Court upon the point was not known or was not regarded, seems to us to pass any reasonable possibility.

The defendant seems to think that the result unjustly enriches the plaintiff; but this is not true. It does indeed go to swell the funds available to pay its creditors in general, but by no chance can the shareholders profit. The defendant certainly did undertake to accept the hazard of the loss, and why it should be able to interpose as a condition the continued ability of the reinsured to meet its part of the obligations, is not clear. Of course if it so stipulated, it may insist; but it must stand upon its contract, no general considerations of equity make in its favor.

Judgment affirmed.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of March, one thousand nine hundred and thirty-seven.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

LOUIS H. PINK, as Superintendent, etc., Plaintiff-Appellee,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 82] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Louis H. Pink, as Supt., etc., vs. Fidelity & Deposit Company of Maryland. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 15, 1937. William Parkin, Clerk.

[fol. 83] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 82, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Louis H. Pink

as Superintendent, etc., Plaintiff-Appellee, against Fidelity & Deposit Company of Maryland, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this fourteenth day of April, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 84] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.